Tan Yen Foon v Pentadbir Tanah Wilayah Persekutuan Kuala Lumpur

HIGH COURT (KUALA LUMPUR) — LAND REFERENCE NO S6–15–26 OF 2001
ABDUL MALIK ISHAK J
12 JULY 2007

Evidence — Adverse inference — Failure to produce document — Failure to produce the Development Order from the relevant issuing authority — Evidence Act s 114g — Emergency (Essential Powers) Ordinance No 46, 1970 ss 15(1), 16(1), 16(4), & 17(1) — Town Boards Enactment FMS Chapter 137 s 90 — Federal Territory (Planning) Act 1982 (Act 267) s 21(3) — Repealed City of Kuala Lumpur (Planning) Act 1973 s 18(1) and 18(2)

Land Law — Acquisition of land — Compulsory acquisition — Schedule land — Nominal damages of RM10 awarded by Land Administrator — Whether objection to the award can be heard — Whether declaration conclusive evidence — Governing principle putting the claimant to his original financial position — Whether compensation is adequate — Whether scheduled land was surrendered — Land Acquisition Act 1960 ss 3, 8, 37(1), 40A(2), 40(D)(3)

The plaintiff applicant filed this application after the Land Administrator awarded him RM10 as nominal damages for the compulsory acquisition of his property Lot No 23, grant 4618, section 3, Pekan Kepong, district of Wilayah Persekutuan, State of Wilayah Persekutuan measuring 0 acre 0 rood 5.28 poles which comes up to approximately 1,437 square feet on 10 November 1994. In deciding on the award, the Land Administrator took into account the factors affecting value which were contained the government valuation report. The plaintiff applicant's objection was on the amount of the compensation and that the grounds objection were confined to the award that is said to be below the market value. The defendant asserted that the scheduled land had been surrendered as road reserve land which the plaintiff denied. The defendant also contended that as the award was less than RM3,000, the plaintiff applicant had no right of objection under s 37(2) of the LAA and that award is final.

Held:

(1) The court was empowered to hold that the words 'shall be final'

A appearing in s 37(2) of the LAA to mean that it is final and there is no right of an objection vested in the plaintiff applicant as the registered proprietor of the subject property to make an objection to this court in regard to the amount of the compensation awarded by the land administrator in regard to the compulsory acquisition of the scheduled land. In other words, the award of RM10 by the land administrator is final and it ends there (see para 19).

(2) Thus, being an absolute provision, s 37(2) of the LAA 'must be obeyed exactly' as phrased and framed by the legislature and I must give effect to it accordingly. But all is not lost. The words appearing in the final part of s 37(2) of the LAA that read, 'no objection may be made under subsection (1) in respect thereof' gives this court the necessary power to hear and adjudicate the objection as regards 'the amount of the compensation' awarded by the land administrator (see para 22).

(3) It must be emphasised that the land administrator was influenced by the government valuation report that was made available to him. The land administrator took into account that the scheduled land has to be surrendered for road reserve when it has been developed. The land administrator would not have awarded the sum of RM10 had he acted on his own volition without advantage of reading and relying upon the government valuation report. The government valuer was physically present before the land administrator during the enquiry. The land administrator took into account that the subject property had been developed and this fact was recorded by the land administrator at p 5 of encl one (1) (see para 56).

(4) It can also be inferred that since the plaintiff applicant had erected the existing three storey building on the set back of 20 feet in the same manner as the other Lots especially Lot 31, it shows on the balance of probabilities that the plaintiff applicant had developed his land on his own volition after the establishment of DBKL bearing in mind that Lot 31 which is situated within the same vicinity with the subject property was granted a development order on 15 July 1980. Thus, by his own conduct the plaintiff applicant had subjected himself to the conditions attached to Lot 31 and that would be to have a set back and surrender the scheduled land for road reserve. It is for these reasons that the plaintiff applicant has no exclusive control over the scheduled land and, at the time of the acquisition, the scheduled land is used for public parking where members of the public have free access to it – either to park their motor vehicles or to walk on it, all day long. In short, at the time of acquisition by the State Authority, the scheduled land was not generating any income to the plaintiff applicant (see para 66).

(5) By virtue of s 40D(3) of the LAA any decision made under this section is final and there shall be no further appeal to a higher Court on the matter (see para 67).

[Bahasa Malaysia summary

Plaintif pemohon telah memfailkan permohonan ini selepas Pentadbir Tanah telah mengawardkannya RM10 sebagai gantirugi nominal untuk pengambilalihan wajib tanahnya Lot No 23, geran 4618, seksyen 3 Pekan Kepong, daerah Wilayag Persekutuan, negeri Wilayah Persekutuan berukuran 0 ekar 0 rud 5.28 pol yang mana kira-kira 1,437 kaki persegi pada 10 November 1994. Dalam menetapkan award, Pentadbir Tanah telah mengambil kira faktor-faktor yang menjejaskan nilai yang terkandung di dalam laporan penilaian kerajaan. Bantahan pemohon plaintif adalah ke atas jumlah pampasan dan alasan bantahan terbatas kepada award yang dikatakan di bawah nilai pasaran. Defendan menegaskan bahawa tanah yang dijadualkan telah diserahkan sebagai tanah simpanan jalan yang mana dinafikan plaintif. Defendan juga menegaskan bahawa award adalah kurang daripada RM3,000, plaintif pemohon tidak mempunyai hak membantah di bawah s 37(2) APT dan award tersebut adalah muktamad.

Diputuskan:

(1) Mahkamah telah diberikan kuasa untuk berpagang bahawa perkataan 'shall be final' yang tertera dalam s 37(2) APT untuk membawa maksud bahawa ianya adalah muktamad dan tidak terdapatnya hak membantah kepada plaintif pemohon sebagai pemilik berdaftar harta tanah tersebut untuk membuat bantahan kepada mahkamah ini berkenaan dengan jumlah pampas an yang diawardkan oleh pentadbir tanah berkenaan dengan pengambilalihan wajib tanah berjadual. Dalam erti kata lain, award RM10 oleh pentadbir tanah adalah muktamad dan berakhir di sana (lihat perenggan 19).

(2) Oleh itu, sebagai peruntukan mutlak, s 37(2) APT 'mestilah dipatuhi sebetul-betulnya' sebagaimana diungkapkan dan dibentuk oleh badan perundangan dan Saya mestilah memberikan kesan ke atasnya dengan sewajarnya. Tetapi kesemuanya tidak hilang. Perkataan-perkataan yang tertera dalam bahagian terakhir s 37(2) APT dibaca ' tiada bantahan boleh dibuat di bawah subseksyen (1) berkenaan dengannya' memberikan mahkamah ini kuasa yang perlu untuk mendengar dan menghakimi bantahan berkenaan dengan 'jumlah pampasan' yang telah diawardkan oleh pentadbir tanah (lihat perenggan 22).

(3) Ianya perlu ditekankan bahawa pentadbir tanah telah terpengaruh dengan laporan penilaian kerajaan yang dibuat kepadanya. Pentadbir

tanah mengambil kira bahawa tanah berjadual perlu diserahkan untuk simpanan jalan apabila ianya telah dibangunkan. Pentadbir tanah tidak akan mengawardkan sejumlah RM10 yang bertindak di atas kerelaannya tanpa kelebihan membaca dan bergantung kepada laporan penilaian kerajaan. Penilai kerajaan hadir sendiri di hadapan pentadbir tanah ketika siasatan. Pentadbir tanah mengambil kita bahawa hartanah tersebut telah dibangunkan dan fakta ini telah direkodkan oleh pentadbir tanah di mukasurat 5 lampiran 1 (lihat perenggan 56).

(4) Ianya boleh disimpulkan bahawa semenjak plaintif pemohon telah mendirikan bangunan tiga tingkat yang wujud yang disetkan 20 kaki sama dengan lot-lot yang lain terutama lot 31. ianya menunjukkan atas imbangan kebarangkalian bahawa plaintif pemohon telah membangunkan tanahnya atas kerelaannya selepas penubuhan DBKL perlu diingat bahawa lot 31 tang mana terletah di dalam kawasan yang sama dengan tanah tersebut yang telah diberikan perintah pembangunan pada 15 July 1980. Oleh itu, melalui tindakannya sendiri plaintif pemohon sendiri tertakluk kepada syarat-syarat yang terikat kepada lot 31 dan ianya perlu diberikan dan diserahkan tanah berjadual untuk simpanan jalan. Adalah untuk sebab ini bahawa plaintif pemohon tidak mempunyai kawalan eklusif terhadap tanah berjadual dan, pada masa pengambilalihan, tanah berjadual adalah digunakan untuk ruanh letak kenderaan awam yang mana orang awam mempunyai laluan percuma kepadanya, sama ada untuk meletakkan kenderaan atau untuk berjalan atasnya sepanjang hari. Secara ringkas, semasa pengambilalihan oleh pihak berkuasa negeri, tanah berjadual tidak menjana apa-apa pendapatan kepada plaintif pemohon (lihat perenggan 66).

(5) Berdasarkan kepada s 40D(3) APT mana-mana keputusan yang dibuat di bawah seksyen ini adalah muktamad dan seharusnya tiada rayuan selanjutnya kepada mahkamah yang lebih tinggi dalam perkara ini (lihat perenggan 67).]

Notes

For cases on failure to produce document, see 7(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 199–200.

For a case on compulsory acquisition, see 8(1) *Mallal's Digest* (4th Ed, 2002 Reissue) para 1876.

Cases referred to

Anisminic v Foreign Compensation Commission [1969] 2 AC 147 (refd)

Baker, Re [1890] 44 ChD 262 (refd)

Bukit Rajah Rubber Co Ltd v Collector of Land Revenue, Klang [1968] 1 MLJ 176 (refd)

Che Pa bin Hashim & Ors v The Collector of Revenue, Kedah [1992] MLJU 70 (refd)
Chuah Say Hai & Ors v Collector of Land Revenue, Kuala Lumpur [1967] 2 MLJ 99 (refd)
Damansara Jaya Sdn Bhd v Pemungut Hasil Tanah Petaling [1992] 2 MLJ 660 (refd)
Julius v Bishop of Oxford [1880] 5 App Cas 214 (refd)
Hock Lim Estate Sdn Bhd v Collector of Land Revenue, Johore Bahru [1980] 1 MLJ 210 (refd)
Kam Wai Jin v Superintendent of Lands and Surveys, Third Division [1969] 2 MLJ 22 (refd)
Khoon Chye Hin v PP [1961] MLJ 105 (refd)
Khoo Peng Leong & Ors v Superintendent of Lands and Surveys, Third Division [1966] 2 MLJ 156 (refd)
Ko Rubber Plantations Pte Ltd v Pemungut Hasil Tanah, Batu Pahat [1991] 1 CLJ 179 (refd)
Kwang Hap Siang Ltd v Pentadbir Tanah Daerah Gombak [1992] 1 CLJ 146 (refd)
Land Administrator, District of Gombak v Huat Heng (Lim Low & Sons) Sdn Bhd [1990] 3 MLJ 464 (refd)
Muharam bin Anson v PP [1981] 1 MLJ 222 (refd)
Munusamy v PP [1987] 1 MLJ 492 (refd)
Nanyang Manufacturing Co v Collector of Land Revenue, Johore [1954] MLJ 69 (refd)
Ng Tiou Hong v Collector of Land Revenue, Gombak [1984] 2 MLJ 35 (refd)
Ooi Hock Leong v R [1955] MLJ 229 (refd)
Oriental Rubber & Oil Palms Sdn Bhd v Pemungut Hasil Tanah, Kuantan [1983] 1 MLJ 315 (refd)
Pemungut Hasil Tanah, Daerah Barat Daya (Balik Pulau), Pulau Pinang v Kam Gin Paik [1983] 2 MLJ 390 (refd)
Pentadbir Tanah Daerah Petaling v Glenmarie Estate Ltd [1992] 1 MLJ 331 (refd)
PP v Chee Kon Fatt [1991] 3 CLJ 2564 (refd)
PP v Lee Pak [1937] MLJ 265 (refd)
Samsudin v PP [1962] MLJ 405 (refd)
Selvaduray v Chinniah [1939] MLJ 253 (refd)
Sheffield Corporation v Luxford [1929] 2 KB 180 (refd)
Siah Bros Plantation Sdn Bhd v Pentadbir Tanah dan Daerah Kuantan [1993] 3 CLJ 435 (refd)
Sin Yee Estate Sdn Bhd (now known as Y & Y Estate Sdn Bhd) v Pentadbiran Tanah Daerah Kinta [2006] 1 MLJ 12 (refd)
Smith v Cammell Laird & Co Ltd [1940] AC 242 (refd)
Wan Mohamed v Collector, Kota Bahru [1968] 2 MLJ 64 (refd)
Woodward v Sarsons [1875] LR10 CP 733 (refd)

A *Yew Lean Finance Development (M) Sdn Bhd v Director of Lands & Mines, Penang* [1977] 2 MLJ 45 (refd)

Legislation referred to

Emergency (Essential Powers) Ordinance 1970 ss 15(1), 16(1), 16(4), 17(1)
B Evidence Act 1950 s 114(g)
Federal Constitution art 13(2)
Federal Territory (Planning) Act 1982 (Act 267) s 21(3)
Land Acquisition Act 1960 ss 1(1)(b), 3, 8, 12, 37, 38, 40A(2), 40C, 51(1)(a)
Repealed City of Kuala Lumpur (Planning) Act, 1973 (Act 107) s 18
C Town Boards Enactment FMS Chapter 137 s 90

Mastura Ma'sud (Arifin & Partners) for the plaintiff/applicant
Mohd Zaki bin Md Yasin (Mat Zaraai bin Alias and Ab Karim bin Ab Rahman) (Attorney General's Chambers) for the defendant/ respondent

D **Abdul Malik Ishak J:**

[1] This is a land acquisition hearing with the assistance of two assessors conducted under s 40A(2) of the Land Acquisition Act 1960 ('the LAA').
E The subject property is Lot No: 23, grant 4618, section 3, Pekan Kepong, district of Wilayah Persekutuan, State of Wilayah Persekutuan measuring 0 acre 0 rood 5.28 poles which comes up to approximately 1,437 square feet. The area that has been compulsorily acquired is about 360 square feet and it shall be referred to as the 'scheduled land'. The tenure of the subject property
F is freehold and the registered proprietor is none other than the plaintiff/applicant himself.

[2] By way of a gazette notification vide no 10445 dated 10 November 1994, the subject property was compulsorily acquired by the State Authority.
G This was done pursuant to s 8 of the LAA. It must be borne in mind that once a gazette notification has been issued under s 8 of the LAA, it is conclusively established that the lands are needed for the purpose stated therein, and the only complaint which the plaintiff/applicant, as the registered proprietor of the scheduled land, can advance is whether the
H provisions of the LAA have been complied with. Here, there is no gazette notification under section 4 of the LAA and so by virtue of s 1(1)(b) of the First Schedule to the LAA the market value of the scheduled land is the date of the s 8 notice and that would be on 10 November 1994.

I THE PURPOSE OF THE ACQUISITION

[3] The s 8 notice states the purpose as follows (see the Form 'D' declaration of the intended acquisition):

Projek memperbaiki Jalan Kepong dari bulatan Kepong ke sempadan Wilayah Persekutuan (Fasa IV — dari persimpangan Jalan Ambong ke persimpangan bertingkat Kepong).

[4] Section 3 of the LAA leaves the entire discretion with the State Authority to choose an area of land for whatever purpose or purposes it needs to acquire. That section enacts as follows:

3. Acquisition of land

(1) The State Authority may acquire any land which is needed —

(a) for any public purpose;

(b) by any person or corporation for any purpose which in the opinion of the State Authority is beneficial to the economic development of Malaysia or any part thereof or to the public generally or any class of the public; or

(c) for the purpose of mining or for residential, agricultural, commercial or industrial or recreational purposes or any combination of such purposes.

[5] Now, the State Authority need not confine its acquisition of land for purposes which come under one head only of s 3 of the LAA, that is, either under s 3(1)(a), 3(1)(b) or 3(1)(c) of the LAA. The State Authority may use either head individually or may combine one or two of them as it deems fit. It may, for instance, acquire land under one of the limbs of s 3(1)(a), 3(1)(b) or even part of the limb of s 3(1)(c) of the LAA, or it may combine more than one of these purposes. The purposes mentioned in Form 'D' as alluded to earlier fall under and within ss 3(1)(a) and 3(1)(b) of the LAA and they are not vague and they should be held to be valid. By way of an analogy, the case of *Yew Lean Finance Development (M) Sdn Bhd v Director of Lands & Mines, Penang* [1977] 2 MLJ 45 should be referred to. There, the notification issued by the State government under the LAA was challenged on the ground that the lands were being acquired for a vague purpose, and it was argued that the notice of acquisition was null and void. In fact, the notification stated in a cumulative manner that the lands were being acquired for residential, industrial and public purposes. The court rejected the challenge to the notification and held that, by virtue of s 3 of the LAA, the government has the sole right to decide what is or what is not a public purpose and, in this respect, the decision of the government cannot be questioned in a civil court. The court also held that the notification was not vague and that it was valid. Fortunately, in this case, the plaintiff applicant did not dispute nor challenge as to whether the provisions of the LAA have been complied with when the subject property was acquired.

[6] Be that as it may, it must be emphasised that s 8(3) of the LAA provides that the declaration shall be conclusive evidence that all the scheduled land is needed for the purpose specified therein. In other words, the Form 'D' in this case is conclusive evidence favouring the State Authority and it cannot be questioned at all. However, a note of caution must be registered. A declaration made pursuant to s 8(3) of the LAA may be treated as a nullity if it can be shown that the acquiring authority has misconstrued its statutory powers (*Anisminic v Foreign Compensation Commission* [1969] 2 AC 147) and it is not the case here.

THE ENQUIRY BY THE LAND ADMINISTRATOR

[7] This is carried out pursuant to s 12 of the LAA. And, according to art 13(2) of the Federal Constitution, 'compensation' has to be 'adequate'. Under section 14 of the LAA, the land administrator makes an award, upon the conclusion of the enquiry, as to the amount of the compensation payable for the land acquired. Under s 12(1) of the LAA, the land administrator is required to make full enquiry into the value of the land acquired with a view to fix the quantum of the compensation. The land administrator has carried out his statutory duties in this case and in the course of which he must have had sight of the government valuer's report as seen at pp 17 to 24 of encl one (1). The enquiry was conducted on 2 August 1995 and the award was handed down on 26 October 1995 (see pp 3 to 6 of encl one (1)).

[8] The plaintiff applicant gave evidence before the land administrator and this was what he said (see p 4 of encl one (1)):

> Saya adalah pemilik tanah bagi Lot 23 seksyen 3 pekan Kepong. IDT asal dan resit bayaran cukai tanah tahun 1995 telah di kemukakan untuk semakan. Cukai tanah tahun 1995 telah dibayar. Borang E & F APT 1960 telah di terima dan faham akan maksudnya. Tiada halangan tanah ini di ambil kerajaan asalkan dengan pampasan yang mencukupi.

[9] Continuing further, the plaintiff applicant had these to say (see p 5 of encl one (1)):

> Tidak ada pengambilan tanah sebelum ini. Tidak ada tanah lain bersebelahan atau berdekatan dengan tanah ini. Tanah ini tidak di gadai kepada mana mana pihak. Pembangunan di atas tanah ini telahpun di laksanakan.
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> Di atas tanah terdapat sebuah bangunan batu 3 tingkat yang dibina sejak 25 tahun yang lalu. Butir butir lanjut tentang bangunan tidak dapat di pastikan. Pembangunan bangunan ini di anggarkan menelan belanja lebih kurang RM60,000. Luas binaan ialah 18' x 60'. Bahagian hadapan bangunan tidak

diserahkan kepada Kerajaan. Dari segi tuntutan pampasan saya memohon supaya tanah ini di bayar dengan harga RM200 sekaki persegi berdasarkan kepada harga pasaran di kawasan berkenaan.

[10] The land administrator also recorded the evidence of the representative from the Dewan Bandaraya Kuala Lumpur ('DBKL') as well as the government valuer. The land administrator then adjourned the enquiry pursuant to s 12(3) of the LAA.

[11] On 26 October 1996, the land administrator made known his award. This was what he wrote (see p 6 of encl one (1)):

Pada hari ini (26 Oktober 1996) saya telahpun mengkaji dan meneliti tuntutan pampasan daripada pemilik tanah dan didapati tuntutannya agak tinggi dan dengan itu permohonan tersebut tidak dapat di pertimbangkan dengan sepenuhnya. Tanah ini perlu di serahkan untuk rizab jalan apabila dibangunkan. Dengan ini adalah diperintahkan bahawa tanah lot 23 seksyen 3 pekan Kepong seluas lebih kurang 360 k.p. (33.45m) yang di ambil balik untuk memperbaiki Jalan Kepong dari bulatan Kepong ke sempadan Wilayah Persekutuan (Fasa IV – dari persimpangan Jalan Ambong ke persimpangan bertingkat Kepong) di bayar mengikut butir-butir seperti berikut:

Orang orang berkepentingan	Jenis kepentingan	Bahagian pemberian
Tan Yen Foon No k/p 1484813	Pemilik tanah	RM10 (nominal)

Perintah award pampasan ini diperbuat pada 26 October 1996.

[12] It is the stand of the plaintiff applicant that the land administrator had not indicated his reasons for awarding the nominal award nor did the land administrator referred to any documents or alluded to any evidence which he had relied upon before arriving at his conclusion. Now, even though the nature of the enquiry is not specified, yet under s 13(1) of the LAA, the land administrator has the necessary power to summon witnesses and examine them on oath. The land administrator too is empowered under s 13(1) of the LAA to compel the production and delivery to him of documents, including issue documents of title and other documents evidencing title. In *Oriental Rubber & Oil Palms Sdn Bhd v Pemungut Hasil Tanah, Kuantan* [1983] 1 MLJ 315, VC George J. (as he then was) held that the collector in holding an inquiry was clothed with judicial powers. This was what his Lordship said (see p 318 of the report):

... there is no question but that the holding of the inquiry pursuant to section 12 and the making of the award pursuant to section 14 are quasi-judicial functions which could and do affect the individual.

[13] The High Court in *Pemungut Hasil Tanah, Daerah Barat Daya (Balik Pulau), Pulau Pinang v Kam Gin Paik* [1983] 2 MLJ 390 had ruled that there was a denial of natural justice to the respondent at the time of the s 12 of the LAA enquiry by the land administrator, but on appeal, the Federal Court overruled the High Court and held that there was no breach of natural justice. The Federal Court also held that although s 12 of the LAA is entitled 'Procedure at Enquiry', yet no detailed procedure is really laid down in the section. It was argued on behalf of the respondent that the words 'full enquiry' that appear in s 12 of the LAA 'necessarily implied' that all the rules of natural justice should be dutifully observed by the land administrator and before the land administrator made his award. But, the Federal Court had this to say (see p 393 of the report):

> It is fairly clear from the language of section 12 that the function of the Collector (referring to the land administrator) is not merely administrative but there is implied a proper exercise of discretion. It should be borne in mind however that an enquiry under section 12 is for the purpose of assessing the amount of compensation which in the opinion of the Collector (referring to the land administrator) would be appropriate in each case and towards this end he is required to make a full enquiry. Therefore the purpose of the enquiry is to satisfy the Collector (referring to the land administrator) on the question of the amount of compensation and it will only be in breach of the duty imposed on the Collector (referring to the land administrator) by this section if he deliberately ignores materials relevant to the assessment and the amount of compensation. That section does not require him to go beyond that duty.

[14] To me, the assessment of compensation by the land administrator is more in the nature of an objective approach bearing in mind art 13(1) of the Federal Constitution rather than a purely subjective approach. Be that as it may, perhaps the land administrator was influenced by the government valuation report that can be seen at pp 17 to 24 of encl one (1). This was what the government valuer said in his valuation report at pp 21 to 22 of encl one (1):

> FACTORS AFFECTING VALUE
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> In assessing the compensation payable for the scheduled land acquired, we have taken into consideration the following factors:
>
> (i) The scheduled land is used for carparking by the public. The registered proprietor has no exclusive use of it and neither has exclusive control over the scheduled land. Any members of the public can park their cars or walk on it at any time of the day.
>
> (ii) We were unable to obtain the conditions stipulated by the Authorities when the redevelopment was approved. The fact that the new building was setback 20 feet indicated that it was a condition for the

redevelopment approval and the fact that the owner had built the new building indicated that the owner had accepted the condition.

(iii) We are also guided by the basic principle of compensation. It states that the sum awarded should as far as practicable places the claimant in the same financial position as he would have been in had there been no question of his land been compulsorily acquired.

(iv) We are also guided by the Supreme Court's decision in Land Administrator, District of Gombak v Huat Heng (Lim Low & Sons) Sdn. Bhd.

OPINION OF VALUE

Based on the factors mentioned above, we are of the opinion that a nominal sum of RM10 be compensated to the registered proprietor for the scheduled land acquired.

[15] The same government valuer prepared an additional valuation report styled as the 'Respondent's Valuer's Reply' and there at pp 3 to 4 of encl 5A he had this to say by way of a reply:

The setback of 20 feet from the front boundary was not arbitrary but a requirement by the planning authority. All the new shophouses that were redeveloped along this stretch of Jalan Kepong were setback 20 feet and it must be a requirement for redevelopment by the planning authority, otherwise all the new shophouses would not have the same setback. If it is arbitrary as claimed by the applicant's private valuer, then the depths of the setbacks will vary from one new shophouse to another and some may not have setbacks at all.

The assumption that if there is no endorsement in the title for the surrender of the setback land goes to show that it was not a condition for the provision/surrender of the setback may not necessarily be true. Lot No 31 Section 2 Pekan Kepong is located along Jalan Kepong and is within the town of Kepong. It was redeveloped with a three-storeyed shophouse. The development order (attached as Appendix 'A') required the owners to apply to the Director of Lands and Mines, Wilayah Persekutuan, Kuala Lumpur, under s 200 (Borang 12(b)), National Land Code, amongst other things, to surrender a portion of the land for road improvement. However, at the date of gazette notification of the acquisition, there was no memorial in the title of this plot of land on the surrendering of the land. This demonstrates that the owner has not complied with the development order and no memorial in the title does not automatically mean there is no condition attached on the development approval.

The fact that the three-storeyed shophouse on the subject property had been built (with a) setback (of) 20 feet from the front boundary similar to the other new shophouses indicated that it is a planning requirement and the fact that the three-storeyed shophouse on the subject property had (been) built with the setback demonstrated that the owner had accepted the condition of the approval.

In the light of the above, the applicant is not entitled to claim the market value of his land as guided by *Land Administrator, District of Gombak v Huat Heng (Lim Low & Sons) Sdn Bhd*, Civil Appeal No. 01–13 of 1990. The Supreme Court said that the owner should not be allowed to deny the condition which he had agreed to, that is to surrender the land as indicated on the plan for a public purpose, and he cannot claim the market value for the land.

[16] The case of *Land Administrator, District of Gombak v Huat Heng (Lim Low & Sons) Sdn Bhd* relied upon by the government valuer has since been reported in the local law journal vide [1990] 3 MLJ 464, a decision of Hashim Yeop A Sani CJ (Malaya) (as he then was). There, the Supreme Court allowed the appeal by the land administrator and held that the owner should not be allowed to deny the condition which he had agreed to, that is to surrender the land as indicated on the plan for a public purpose, and the owner cannot claim the market value of the land. This was what his Lordship Hashim Yeop A Sani CJ (Malaya) (as he then was), writing for the Supreme Court, said at page 465 of the report:

> Having regard to the background of the said land, it is clear that the express condition imposed had been accepted by the proprietor of the land, which had made all the payments which were required for the said approval. Having regard to all these facts the Land Administrator, District of Gombak, had issued an order for the value of compensation as recommended by the Selangor Valuation Department, ie $10 be awarded as nominal compensation to the proprietor of the land.
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> The submission of counsel for the respondent is that because acquisition had been made under the Land Acquisition Act 1960, compensation must be made in accordance with the market value. Based on the submission, the judge had agreed to award the compensation as stated above.
>
> We are of the opinion that the judge of the High Court has failed to apply the true principle of compensation. The relevant principle concerning compensation is well settled, that is the compensation awarded should as far as practicable place the claimant in the same financial position as he would have been in had there been no acquisition of the land. This principle is stated in the text book *Compulsory Acquisition and Compensation* by Sir Frederick Corfield QC and RJA Carnwath at p 161 as follows:
>
> > The basic principle of the law of compensation is that the sum awarded should as far as practicable place the claimant in the same financial position as he would have been in had there been no question of his land being compulsorily acquired [Original text].
>
> Applying the above principle to the present case we are of the opinion that it is not proper for the proprietor of the land to submit that it must be awarded compensation according to the market value. It is clear to us that the proprietor of the land must not be allowed to deny the express condition which it had accepted when receiving the approval for the change of condition of the said land.

[17] Based on the government valuation reports, the land administrator awarded the nominal sum of RM10 on the basis that there was a surrender of the scheduled land. Bearing in mind that the award by the land administrator was only RM10, the crucial question to pose would be this: can the plaintiff applicant as the registered proprietor of the subject property make an objection to this court against the amount of the compensation awarded by the land administrator in regard to the compulsory acquisition of the scheduled land? It seems to me that after the land administrator has decided the amount of compensation for the land acquired – referring to the scheduled land, any objection against it provided that the amount of compensation exceeds RM3,000 can be made in writing to the land administrator himself requiring him to refer the matter to the High Court for its determination (see s 37(1) of the LAA which has to be read with s 38(1) of the LAA). Here, as I said, the land administrator's award was a nominal sum of RM10. And so, under s 37(2) of the LAA, the land administrator's award which was below RM3,000 is said to be final and no objection can be raised against it. Section 37(2) of the LAA is worded in this way:

> 37(2) Where the total amount awarded in compensation in respect of any interest in any scheduled land does not exceed three thousand ringgit the written award of the Land Administrator shall be final with regard to both the measurement of the land and the amount of compensation awarded, and no objection may be made under subsection (1) in respect thereof.

[18] According to Lord Cairns in *Julius v Bishop of Oxford* [1880] 5 App Cas 214, 222, the words 'it shall be lawful' are words:

> Making that legal and possible which there would otherwise be no right or authority to do. They confer a faculty or power, and they do not of themselves do more than confer a faculty or power. But these may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed to exercise that power when called upon to do so. These words being, according to their natural meaning, permissive or enabling words only, it lies upon those who contend that an obligation exists to exercise this power to show in the circumstances of the case something which, according to the principles I have mentioned, creates this obligation.

[19] I am certainly empowered to hold that the words 'shall be final' appearing in s 37(2) of the LAA to mean that it is final and there is no right of an objection vested in the plaintiff applicant as the registered proprietor of the subject property to make an objection to this court in regard to the amount of the compensation awarded by the land administrator in regard to the compulsory acquisition of the scheduled land. In other words, the award

of RM10 by the land administrator is final and it ends there. Some detractors may say that s 37(2) of the LAA is a harsh provision. For my part, I merely accept it as the law of this country.

[20] Lord Atkin in *Smith v Cammell Laird & Co Ltd* [1940] AC 242 at p 258, spoke of the compulsory terms of a statute in these illuminating words:

> It is precisely in the absolute obligation imposed by a statute to perform or forbear from performing a specified activity that a breach of statutory duty differs from the obligation imposed by common law which is to take reasonable care to avoid injuring another.

[21] Coleridge CJ in *Woodward v Sarsons* [1875] LR10 CP 733 at p 746 aptly said:

> An absolute enactment must be obeyed or fulfilled exactly, but it is sufficient if a directory enactment be obeyed or fulfilled substantially.

[22] Thus, being an absolute provision, s 37(2) of the LAA 'must be obeyed exactly' as phrased and framed by the legislature and I must give effect to it accordingly. But all is not lost. The words appearing in the final part of s 37(2) of the LAA that read, 'no objection may be made under subsection (1) in respect thereof' gives this court the necessary power to hear and adjudicate the objection as regards 'the amount of the compensation' awarded by the land administrator. Section 37(1) of the LAA states as follows:

> (1) Any person interested in any scheduled land who, pursuant to any notice under ss 10 or 11, has made a claim to the Land Administrator in due time and who has not accepted the Land Administrator's award thereon, or has accepted payment of the amount of such award under protest as to the sufficiency thereof, may, subject to this section, make objection to —
>
> (a) the measurement of the land;
>
> (b) the amount of the compensation;
>
> (c) the persons to whom it is payable;
>
> (d) the apportionment of the compensation.

[23] As to the meaning to be given to the word 'may' that appears in the final part of section 37(2) of the LAA, I need to refer to the case of *Re Baker* [1890] 44 ChD 262. That was a case where a power was given by s 125(4) of the Bankruptcy Act 1883 to transfer the administration of an insolvent estate from the Chancery Division to the Court of Bankruptcy. The question

that was posed before the court was whether it was a power that must be exercised. Cotton LJ at pp 270 to 271 aptly said:

> I think that great misconception is caused by saying that in some cases 'may' means 'must'. It can never mean 'must' so long as the English language retains its meaning; but it gives a power and then it may be a question in what cases, where a judge has a power given to him by the word 'may', it becomes his duty to exercise it…... In my opinion there is given by the word 'may' a power, to the exercise of which there is a discretion, and there is not here enough to show that it was the duty of the judge to exercise that discretion.

[24] Talbot J, in *Sheffield Corporation v Luxford* [1929] 2 KB 180, 183 said the same thing in his own words:

> It has often been said…. that in many statutes the word 'may' means 'must'……. 'May' always means 'may'. 'May' is a permissive or enabling expression, but there are cases in which for various reasons as soon as the person who is within the statute is entrusted with the power it becomes his duty to exercise it.

[25] Thus, the discretion falls on this court to hear the objection of the plaintiff applicant challenging the amount of the compensation awarded by the land administrator. We will now hear the objection forthwith.

[26] I am delighted to report and record that both the assessors in the persons of Madam Zaleha binti Baharum, a valuation officer employed by the government, and Mr Mohd Nor bin Abdul Manaf, a private valuer, have expressed their opinions pursuant to s 40C of the LAA which enacts as follows:

> 40C Opinion of the assessors
>
> The opinion of each assessor on the various heads of compensation claimed by all persons interested shall be given in writing and shall be recorded by the Judge.

[27] And the opinion of each assessor pursuant to and by virtue of s 37(2) of the LAA is that the land administrator's award of RM10 is final and no objection can be raised against it to this court. That is the end of the road for the plaintiff applicant. But both the assessors are magnanimous. They exercised their discretion and proceeded to hear the objection of the plaintiff applicant.

[28] Acting cautiously, I must say that even if this court were to consider the objections advanced by the plaintiff applicant, this court is certainly bound to follow s 38(2) of the LAA which enacts as follows:

> 38. Form and content of application, etc

A (2) Every application under subsection (1) shall state fully the grounds on which objection to the award is taken, and at any hearing in court no other grounds shall be given in argument, without leave of the Court.

B **[29]** Now, Form 'N' filed by the plaintiff applicant under s 38(1) of the LAA categorically states as follows:

3. Bantahan saya ialah terhadap:

(b) jumlah pampasan.

C 4. Alasan-alasan bantahan saya ialah seperti berikut:

Jumlah yang ditawarkan adalah kurang daripada harga pasaran tanah.

D **[30]** It is apparent that the plaintiff applicant's objection is confined to the amount of the compensation and that the grounds of his objection are confined to the award that is said to be below the market value. The common considerations influencing court decisions regarding the market value of a property may be listed as follows:

E (a) a willing seller and a willing buyer criteria (*Ng Tiou Hong v Collector of Land Revenue, Gombak* [1984] 2 MLJ 35, FC);

(b) previous sales of comparable or similar lots of land (Hock Lim *Estate Sdn Bhd v Collector of Land Revenue, Johore Bahru* [1980] 1 MLJ 210 FC; *Wan Mohamed v Collector, Kota Bahru* [1968] 2 MLJ 64; *Nanyang Manufacturing Co v Collector of Land Revenue, Johore* [1954] MLJ 69; *Ko Rubber Plantations Pte Ltd v Pemungut Hasil Tanah, Batu Pahat* [1991] 1 CLJ 179; *Pentadbir Tanah Daerah Petaling v Glenmarie Estate Ltd* [1992] 1 MLJ 331; and *Che Pa bin Hashim & Ors v The Collector of Revenue, Kedah* [1992] MLJU 70); and

G

(c) the potential development of the scheduled land (*Khoo Peng Leong & Ors v Superintendent of Lands and Surveys, Third Division* [1966] 2 MLJ 156; *Bukit Rajah Rubber Co Ltd v Collector of Land Revenue, Klang* [1968] 1 MLJ 176; *Kwang Hap Siang Ltd v Pentadbir Tanah Daerah Gombak* [1992] 1 CLJ 146; *Chuah Say Hai & Ors v Collector of Land Revenue, Kuala Lumpur* [1967] 2 MLJ 99; *Siah Bros Plantation Sdn Bhd v Pentadbir Tanah dan Daerah Kuantan* [1993] 3 CLJ 435; *Khoo Peng Loong & Ors v Superintendent of Lands and Surveys, Third Division* [1966] 2 MLJ 156; and *Kam Wai Jin v Superintendent of Lands and Surveys, Third Division* [1969] 2 MLJ 22).

H

I

[31] Before us, notwithstanding Form 'N', the plaintiff applicant advanced his claims for injurious affection, severance and consequential loss. That cannot be entertained by this court as it runs counter to s 38(2) of the

LAA. Two authorities would immediately come to the forefront. The first would be the case of *Damansara Jaya Sdn Bhd v Pemungut Hasil Tanah Petaling* [1992] 2 MLJ 660, a decision of the Supreme Court with a coram of Harun Hashim, Ajaib Singh and Jemuri Serjan SCJJ. The second is the case of *Sin Yee Estate Sdn Bhd (now known as Y & Y Estate Sdn Bhd) v Pentadbiran Tanah Daerah Kinta* [2006] 1 MLJ 12, a decision of the Federal Court with a coram of Abdul Malek Ahmad PCA, Steve Shim CJ (Sabah & Sarawak) and Siti Norma Yaakob FCJ. In the first case, Harun Hashim SCJ delivering the judgment of the Supreme Court aptly said at p 664 of the report:

> On a plain reading of s 38(2), we are of the opinion that the door is not completely shut for an objector to make a fresh claim or raise a new ground of objection to an award of the Collector in the course of the reference proceedings which he had failed to do at the inquiry before the Collector under s 12 of the Act or in the application for reference to the court under s 38(1) of the Act. The objector must, however, obtain the leave of the court before he can do so. In view of s 45(2) of the Act which provides:
>
> > Save in so far as they may be inconsistent with anything contained in this Act, the provisions of the law for the time being in force relating to civil procedure shall apply to all proceedings before the Court under this Act.
>
> the leave of the court is obtained by making a separate application to the court supported by an affidavit explaining the reasons for the additional grounds of objection in accordance with the Rules of the High Court 1980 for such application as a preliminary step before the hearing of the actual reference.
>
> Such an application for leave will afford the Collector an opportunity to make the necessary inquiries to file an affidavit in reply and, where necessary, to object to the application. The additional ground should not be made, as was done here, by throwing it in the face of the court for the first time at the hearing of the reference proper which caught the Collector and the court by surprise.

[32] While in the second case, that great judge by the name of Abdul Malek Ahmad PCA delivering the judgment of the Federal Court succinctly said at p 18 of the report:

> On the issue of a claim for injurious affection under the said s 2(d), the learned Senior Federal Counsel raised an objection to this claim as claim for injurious affection was neither pleaded in the appellant's valuation report not argued during a trial before the learned High Court judge. The learned Senior Federal Counsel contended that since this is a new issue brought before the Federal Court, the appellant is not entitled to raise this issue pursuant to s 38(2) of the Act without leave of court being obtained first.
>
> Section 38(2) of Act provides as follows:

A Every application under subsection (1) shall state fully the grounds on which objection to the award is taken, and at any hearing in court no other grounds shall be given in argument, without leave of the Court.

In *Damansara Jaya Sdn Bhd v Pemungut Hasil Tanah Petaling* [1992] 2 MLJ 660, it was held that an objector is entitled, provided prior leave of the court is obtained, to make a fresh claim or raised a new ground of objection to an award of the Collector in the course of the reference proceedings at the High Court which he had failed to do at the enquiry before the Collector.

C **[33]** No formal application supported by an affidavit was filed by the plaintiff applicant in order to add the additional claims for injurious affection, severance and consequential loss in accordance with the requirements of the Rules of the High Court 1980. Thus, before us, the plaintiff applicant must be barred from advancing his additional claims.

D

MERITS OF THE CASE

[34] It is the stand of the plaintiff applicant that the scheduled land was not surrendered. The defendant respondent held the opposite view. So, the question to pose would be this: was there a surrender of the scheduled land? We would answer this question in the positive.

[35] The plaintiff applicant's private valuer by the name of Mr. Palaniappan Mohan Chockalingam gave evidence. In his witness statement marked 'B', at p 9, at questions 35, 36 and 37, he stated that he made enquiries at two different places, namely, at the Wilayah Persekutuan Land Office and at the Jabatan Perancangan, DBKL in order to find out whether the scheduled land was ever surrendered to the government or whether there was a condition for a setback on the scheduled land and whether there were any approvals by the DBKL for the erection of the building.

[36] The private valuer's search at the Wilayah Persekutuan Land Office revealed that there was no memorial endorsement, special condition or express condition on the title deed for surrendering of any part of the scheduled land or surrender for a setback from the time of development of the shophouse until the acquisition date. The only endorsement that the private valuer found on the document of title was that the quit rent was amended from RM536 per annum to RM401 per annum on 8 January 1998 after the acquisition (see the private valuer's supplementary documents dated 15 March 2004 marked as encl 17 at p 4).

[37] The private valuer's search at the DBKL revealed that there was no record pertaining to any conditions for a setback. According to the private

valuer, there was no planning record available with the planning department of DBKL because the building was completed before the establishment of DBKL in 1974. And based on the physical inspection and photographs taken by the private valuer, it showed that the depths of the setbacks of the buildings along Jalan Kepong including the near neighbouring lands to the scheduled land vary from building to building (see question 51 of the private valuer's witness statement marked 'B' and the photographs at encl 17). Flowing from this, the plaintiff applicant submits that the contention by the government valuer that the setback of 20 feet is a condition and not arbitrarily done cannot be sustained.

[38] The government valuer in his reply in enclosure 5A relied on the Development Order for Lot 31, Jalan Kepong which was issued on 15 July 1980 (see appendix 'A' to encl 5A) in order to justify his contention that the setback is a condition and not done arbitrarily. But the plaintiff applicant says that the Development Order for Lot 31, Jalan Kepong was issued on 15 July 1980 which was after the establishment of the DBKL whereas the subject property was built in 1971 before DBKL existed (see p 5 of encl one (1) and conceded by Rosli bin Nordin (RW2) at p 32 of the notes of evidence). The plaintiff applicant says that it is unfair to make a comparison with Lot 31, Jalan Kepong because the re-development for Lot 31, Jalan Kepong occurred about nine years after the re-development of the subject property. The plaintiff applicant also says that there was no available evidence to support the government valuer's statement that there was no memorial on the title at the date of the gazette notification of the acquisition for Lot 31, Jalan Kepong. It is the plaintiff applicant's submission that the contentions by the government valuer in encl 5A cannot be sustained.

[39] According to the plaintiff applicant, an inference can also be drawn from the Development Order for Lot 31, Jalan Kepong (which was issued after the establishment of the DBKL) to the effect that the requirement for a setback existed only after the establishment of DBKL and not before.

[40] In his examination-in-chief, Rosli bin Nordin (RW2) gave evidence that 'based on the layout plan ie, exh 'G' the front portion of Lot 23 was surrendered for road purposes' (see pp 7 and 9 of the notes of evidence). Rosli bin Nordin (RW2) made this statement based on the dotted lines which appeared in front of the lots located along Jalan Kepong.

[41] Again, in his examination-in-chief, Rosli bin Nordin (RW2) testified as follows (see p 10 of the notes of evidence):

Q: What are the conditions if the owner of Lot 23 apply for re-development of his Lot?

A: One of the main conditions is that the owner of Lot 23 should surrender the front portion for road widening and get approval from the relevant department (JKA-Jabatan Kerja Awam) as well as the land office.

Q: Can you say that this practice was in existence prior to the establishment of DBKL?

A: Yes.

Q: Is there any exemption given to the owner for re-development by not surrendering the front portion of his Lot?

A: No.

[42] Under cross-examination, Rosli bin Nordin (RW2) testified that Lot 4 was located along the same road as the subject property (Lot 23) and the former was also marked by dotted lines on the layout plan (see p 25 of the notes of evidence). Rosli bin Nordin (RW2) conceded that despite this, the owner of Lot 4 was awarded a sum of RM65,000. Flowing from this, it is submitted that the layout plan and the dotted lines appearing on the layout plan cannot be taken as evidence of land surrender of the subject property (Lot 23).

[43] It is the submission of the plaintiff applicant that if there was any requirement for a setback then that requirement only existed after the establishment of DBKL in 1974 and not before.

[44] Again, in examination-in-chief, Rosli bin Nordin (RW2) gave evidence that Lot 4 was awarded compensation in the sum of RM65,000 whereas Lot 3 was awarded a sum of RM10 only. The notes of evidence at p 5 carry the following narratives:

S: Adakah pampasan diberi kepada pemunya Lot 3?

J: Ada, sebanyak RM10 sahaja.

Lot 4 pampasannya adalah RM65,000 (lihat muka surat 6 di L29). Saya tak pasti mengapa jumlah RM10 diberikan kepada Lot 3 itu.

S: Kemungkinan perintah pembangunan beserta syarat penyerahan bahagian tanah sebelum Lot 3 diambil telah diperolehi?

J: Ya. Setuju.

S: Is it true that Development Order for Lot 3 was given prior to the acquisition of Lot 3 and that would explain the RM10 compensation?

J: Ya.

S: Apa undang-undang yang digunakan oleh DBKL untuk mendapat kebenaran perintah pembangunan?

J: Akta 267. Akta Perancang Bandar 1976. Sebelum 1976, ada satu Akta yang lain iaitu Cap 137. Nama Act itu ialah Town Board Enactment (FMS) Cap 137.

[45] Continuing at p 6 of the notes of evidence, Rosli bin Nordin (RW2) testified as follows:

> Saya tidak pasti samada Lot 3 di muka surat 6 bundle 29 diberi kebenaran perintah pembangunan (approval for development order) oleh sebab tiada rekod yang terdapat di jabatan saya di DBKL. Maksud saya tidak dapat dikesan.
>
> Di dalam kes kita Lot 23 terlibat dan saya sudah semak Lot 23. Kedudukan Lot 3 dan Lot 23 adalah sama iaitu kedua-dua terlibat dengan pengambilan. Pampasan diberi kepada tuan punya Lot 23 iaitu RM10 sahaja sama seperti tuan punya tanah di Lot 3.

[46] In short, Rosli bin Nordin (RW2) asserted at p 5 of the notes of evidence that Lot 3 was awarded RM10 because the Development Order for Lot 3 was given prior to the acquisition of Lot 3. But, under cross-examination, Rosli bin Nordin (RW2) agreed that his statements on Lot 3 would not hold water as he had also asserted positively that there were no records in DBKL on Lot 3. Consequently, it is argued that it was not possible for Rosli bin Nordin (RW2) to ascertain the date of the Development Order, if any (see pp 14 and 15 of the notes of evidence).

[47] Further cross-examination of Rosli bin Nordin (RW2) established that there was no Development Order for Lot 4 but, despite this, a sum of RM65,000 was awarded to its owner. It was also established that no Development Order was issued for Lot 23 even though the acquisition process for Lot 23 happened within the same period of time as Lot 4 (see pp 17, 18 and 19 of the notes of evidence). Flowing from all these, the plaintiff applicant submits that there was no justification in awarding a sum of RM10 for the scheduled land. It is said that since Lot 4 was awarded with a sum of RM65,000 in accordance with the market value, the scheduled land too should have been awarded with a compensation in accordance with the market value.

[48] During the cross-examination of Rosli bin Nordin (RW2) it was established that the Development Order for Lot 19, Jalan Kepong was dated 23 August 1976 (see exh 'I') while the Development Order for Lot 31, Jalan Kepong was dated 15 July 1980 (see appendix 'A' annexed to encl 5A) and these two Development Orders were all issued after the establishment of

DBKL in 1974 (see pp 21 and 22 of the notes of evidence). According to the plaintiff applicant, all these showed that the requirement for a setback existed only after the establishment of DBKL and not before. That being the case, it is said that since the scheduled land was re-developed in 1971 well before the existence of the DBKL, the requirement for a setback would not be applicable to the scheduled land.

[49] Upon perusal of exhs 'H1', 'H2' and 'H3', it is obvious that the setbacks for Lots 2, 3, 4 and 5 along Jalan Kepong vary and they are not in uniformity with one another. Under cross-examination, Rosli bin Nordin (RW2) agreed with regard to the setback variation for those Lots and he testified further that if the awning for Lot 3 were to be considered as a structure then the setback would be in uniformity (see pp 26 and 27 of the notes of evidence). It is the submission of the plaintiff applicant that Rosli bin Nordin's (RW2's) evidence of equating awning depth with a setback depth is entirely without merits. Rosli bin Nordin (RW2) had testified, under cross-examination, that, 'Setback is the distance between the new boundary line to the building line after surrender' (see p 22 of the notes of evidence) and he too had earlier testified, in examination-in-chief, that, 'In the layout plan at 'G' the front portion approved for commercial development but 20 feet from the boundary line in front should be surrendered by all the owners for road frontages' (see p 9 of the notes of evidence). Flowing from these, it is the submission of the plaintiff applicant that the setback relates to the 20 feet portion in front of the building and the said distance is to be measured in relation to the building itself, which is a permanent fixture whereas an awning is not a permanent fixture to the land. It is said that if one were to take away the awning for Lot 3, one will only find that the building boundary varies from the other Lots.

[50] Rosli bin Nordin (RW2) conceded that the pre-war buildings appearing on p 19 of the private valuer's supplementary documents dated 15 March 2004 in encl 17 were jutting out whereas the post war buildings were deeper inside. Relying on this concession, the plaintiff applicant submits that the setback of the buildings along Jalan Kepong vary in accordance with the different period of construction and that the scheduled land was re-developed in 1971 before DBKL imposed the requirement for a setback (see p 27 of the notes of evidence). As against these submissions, it must be put on record that when Rosli bin Nordin (RW2) was being cross-examined he remained steadfast and the notes of evidence at p 27 bear this out. I shall now reproduce the evidence in cold print:

> Put:The set backs of the building along Jalan Kepong vary in accordance with the different period of construction.

A: Tidak. Mengikut dotted line di sini (RN–1 of L30) serahan jalan untuk pembesaran Jalan Kepong mestilah sama. Walau bagaimanapun, ada di antara pemilik kedai membina kedai tanpa kelulusan DBKL dan ini membuatkan bangunan tidak seragam. Bagi permohonan yang ada kelulusan DBKL pemilik memalsukan pelan jalan tersebut – ie, RN–1 of L30.

[51] The evidence of Rosli bin Nordin (RW2) under re-examination cannot be ignored totally. This was what he testified (see pp 27 to 30 of the notes of evidence):

RN–1 of L30 (exh 'G') dirujuk dan dia disoal:

Q: Setuju tak pelan susunatur ini telah wujud sebelum penubuhan DBKL lagi?

A: Ya

Q: Sebelum ini awak kata pengurusan bangunan di KL dikendalikan oleh Pesuruhjaya Ibu Kota (Town Board Commissioner). Jadi pelan susunatur adalah menjadi authority untuk setiap permohonan perintah pembangunan?

A: Ya

Soalan berkenaan dotted line:

Q: Adakah awak kata tanah yang diserahkan kepada Kerajaan berdasarkan dotted line dan bukan berasaskan daripada perkara yang lain?

A: Tidak. Bagi permohonan yang diterima dan diproses DBKL akan memasukkan satu syarat di mana tanah di bahagian hadapan diserahkan untuk membesarkan Jalan Kepong tanpa apa-apa pampasan.

Q: Awak setuju tak bahawa dotted line adalah panduan untuk meluluskan development order. Awak setuju?

A: Ya, setuju.

Q: Oleh kerana layout plan ini wujud sebelum DBKL maka dotted line ini bukan menunjukkan tanah itu diserah. Awak setuju?

A: Ya. Dotted line adalah panduan kepada Jabatan Perancang untuk memproses permohonan di mana bahagian yang terlibat dengan pembesaran jalan perlu diserahkan. L17 muka surat 19 dirujuk. Saya tidak setuju dengan istilah-istilah New Building, Post War Building dan Pre-War Building.

Q: Bangunan putih yang menonjol di sebelah kanan kemungkinan bangunan ini dibuat selepas perang dan tidak dapat kelulusan dan oleh itu tidak ada setback. Awak setuju?

A: Ya.

Q: Muka surat 19 of L17 merupakan pandangan atau opinion penilai pemohon yang mana awak sendiri tidak setuju?

A: Ya, sebab saya ada matters in Urban Design jadi istilah-istilah new building, post-war building dan pre-war building memang tidak tepat.

Q: Awak ada memberi keterangan berkenaan Cap 137, adakah ini untuk mengawal perancangan Bandar, awak setuju?

A: Ya.

Q: Setuju sebelum DBKL ditubuhkan Cap 137 digunakan untuk mengawal perancangan Bandar?

A: Ya

[52] In relation to the scheduled land, under re-examination, Rosli bin Nordin (RW2) had this to say (see p 33 of the notes of evidence):

Q: Awak ada kata pengambilan tanah depan Lot 23 oleh Kerajaan tidak dibayar pampasan, setuju?

A: Ya.

Q: Jadi awak setuju sebab pampasan tidak dibayar sebab tanah itu telah diserah kepada Kerajaan?

A: Ya.

[53] Still under re-examination, Rosli bin Nordin (RW2) had this to say (see pp 36 to 37 of the notes of evidence):

Q: Awak telah dirujuk tentang pemberian oleh pejabat tanah berkenaan pengambilan terhadap Lot 3 dan Lot 23 (subject property). Ada catit di dalam rekod kedua-dua Lot ini dibayar RM10 nominal sahaja?

A: Ya.

Q: Awak ada pengetahuan tentang pemberian nominal atau token?

A: Ya.

Q: Dalam keadaan apa?

A: Permohonan tanah Kerajaan oleh DBKL bagi projek joint venture di mana DBKL membayar pada kadar nominal (saguhati) kepada pejabat tanah.

Q: Berapa bayaran nominal atau token itu?

A: Bergantung kepada tanah Kerajaan yang dipohon.

Q: Mengikut amalan berapa yang dibayar?

A: RM10.

Q: RM10 yang diberi kepada pemunya Lot 3 dan Lot 23 (subject property) adalah merupakan pemberian nominal atau token.

A: Ya.

Q: Sekiranya Lot 23 (subject property) memang tidak ada development order atau tidak ada permohonan untuk development order, jadi apa status bangunan itu di kacamata DBKL?

A: Sekiranya tidak ada development order maka bangunan itu disifatkan sebagai pembangunan secara haram dan mengikut peruntukan undang-undang di bawah Akta 267 DBKL berhak untuk merobohkan bangunan tersebut.

[54] I have earlier said that the award of RM10 by the land administrator is caught under s 37(2) of the LAA and that award is final and there is no right of an objection vested in the plaintiff applicant. But this court had exercised our discretion and proceeded to hear the objection. After analysing the evidence, the result would be obvious. The nominal award of RM10 by the land administrator must be affirmed. Under s 51(1)(a) of the LAA, costs shall be borne by the plaintiff applicant. This forms part and parcel of the decision of both the assessors under s 40D (1) of the LAA. That section enacts as follows:

> 40D Decision of the Court on compensation
>
> (1) In a case before the Court as to the amount of compensation or as to the amount of any of its items the amount of compensation to be awarded shall be the amount decided upon by the two assessors.

[55] Notwithstanding all these, I have taken an arduous route of sieving through the evidence in an attempt to dispense justice to the parties bearing in mind that the scheduled land is a precious commodity.

[56] It must be emphasised that the land administrator was influenced by the government valuation report that was made available to him. The land administrator took into account that the scheduled land has to be surrendered for road reserve when it has been developed (see p 6 of encl one (1)). The land administrator would not have awarded the sum of RM10 had he acted on his own volition without advantage of reading and relying upon the government valuation report. The government valuer was physically present before the land administrator during the enquiry. The land administrator took into account that the subject property had been developed and this fact was recorded by the land administrator at p 5 of encl one (1). It was worded as follows:

> Pembangunan di atas tanah ini telahpun dilaksanakan.

[57] It is common ground that DBKL does not keep the 'plan submission and the approval file' for the development of the subject property wherein the scheduled land is located. And there is also no endorsement to show the surrender of the subject property in the land office either. According to the defendant respondent, the real issue surrounding this land reference is not confined to the quantum of the award handed down by the land administrator but rather it revolves on the question of whether the award by the land administrator, on the assumption that the plaintiff applicant had by conduct surrendered the scheduled land to the State Authority for road reserve, is justifiable in the circumstances. The defendant respondent say that it is justifiable. We too hold the same view for the following reasons:

(a) the plaintiff applicant claimed to have developed the subject property into the existing three storey building in 1971, some three years prior to the establishment of DBKL which was in 1974;

(b) the existing three storey building was erected on the set back distance of 20 feet from the front boundary facing the main Jalan Kepong and it is the same distance of setting back for the other lots as well; and

(c) he scheduled land is currently being used by members of the public to park their cars and the plaintiff applicant has no exclusive use nor exclusive control over it.

[58] The plaintiff applicant contend that the building was completed in 1971. The defendant respondent demand proof of it. It must be recalled that the private valuer testified that he obtained the information about the building being built in 1971 from the plaintiff applicant himself. Incidentally, where did the plaintiff applicant submit his development plan to? And which relevant authority issued the approval for the development? Where is the Development Order authorising the erection of the building in 1971? The onus falls on the plaintiff applicant. He who asserts must prove. If the

Development Order is produced by the plaintiff applicant, then we will be able to ascertain that in 1971 there was no express condition about the need to surrender the scheduled land for the road reserve. The condition to surrender a certain portion of the land for road reserve is usually imposed by the planning authority. In this case it would be the DBKL. A classic example of such a Development Order can be seen at Appendix 'A' annexed to encl 5A. That Development Order is meant for Lot 31, Jalan Kepong. Thus, without producing the Development Order for the subject property wherein the scheduled land is located, it can give rise to an inference under s 114(g) of the Evidence Act 1950. The presumption of withholding evidence must be held against the plaintiff applicant (*Munusamy v Public Prosecutor* [1987] 1 MLJ 492; *Public Prosecutor v Lee Pak* [1937] MLJ 265; *Selvaduray v Chinniah* [1939] MLJ 253; *Khoon Chye Hin v Public Prosecutor* [1961] MLJ 105; *Muharam bin Anson v Public Prosecutor* [1981] 1 MLJ 222; *Samsudin v Public Prosecutor* [1962] MLJ 405; *Public Prosecutor v Chee Kon Fatt* [1991] 3 CLJ 2564; and *Ooi Hock Leong v R* [1955] MLJ 229).

[59] The failure on the part of the plaintiff applicant to produce the relevant Development Order for the subject property wherein the scheduled land is located gives rise to the following inferences:

(a) that the plaintiff applicant had actually developed the subject property in the way he did with the existing set back without the authority of the planning department of DBKL; and

(b) that the development of the subject property with the existing set back for parking purposes was carried out after the establishment of DBKL and not in 1971 as claimed by the plaintiff applicant.

[60] It goes without saying that the Development Order is required for the development of any piece of land prior to the establishment of DBKL. The laws then in force requiring Development Orders can be seen in the Town Boards Enactment FMS Chapter 137, the Emergency (Essential Powers) Ordinance No 46, 1970, the City of Kuala Lumpur (Planning) Act, 1973 (Act 107) and the Federal Territory (Planning) Act 1982 (Act 267). It must be emphasised that the City of Kuala Lumpur (Planning) Act 1973 (Act 107) has been repealed and superceded by the Federal Territory (Planning) Act 1982 (Act 267) — see s 65 (1) of the latter Act.

[61] I will now allude to the relevant sections in the legislations mentioned above. Section 90 of the Town Boards Enactment FMS Chapter 137 enacts as follows (the relevant parts):

Notice of new buildings.

90. (i) Every person intending to erect or re-erect any building shall submit to the Board plans and specifications of the proposed building prepared in accordance with this Enactment and the building by-laws.

Board may give directions.

(ii) The Chairman may give written directions to the person submitting a plan and specification with regard to any of the following particulars —

(e) the line of frontage with neighbouring buildings, if the building abuts on or is within fifty feet of a public street;

(g) the setting forward or back of buildings to the regular line of the street as hereinafter defined;

Compensation where building directed to be set back.

(v) If the Chairman directs any person submitting the plan of a building to set such building back to the regular line of the street, compensation shall be paid to him in accordance with s 106, but no compensation shall be made in respect of any land required for the purpose of an arcade or pavement for the use of passengers or for any approach or for rounding off of corners.

[62] Sections 15(1), 16(1), 16(4), and 17(1) of the Emergency (Essential Powers) Ordinance No 46 1970 enact as follows:

Prohibition of development without payment of development charge and without permission.

15(1) After the coming into force of this Ordinance planning permission shall be required for carrying out any development of land and, no development or change of use of any land shall be undertaken or carried out —

(a) (a) without obtaining a certificate from the Authority certifying that the rules relating to development charges, if applicable have been complied with; and

(b) (b) without obtaining planning permission in writing as provided for hereinafter.

Application for planning permission.

16(1) Any person intending to carry out any development or any change of use of land shall make an application in writing to the Authority for planning permission in such form and containing such particulars and accompanied by such documents and plans and fees as may be prescribed.

16(4) The Authority shall, within fourteen days after the time limited to file objections as provided in subsection (3), hear the applicant and those persons who have given notice of their objections and who have made a request to be heard.

Development order.

17(1) The Authority shall if the application for planning permission is in conformity with the development plan grant planning permission unconditionally or grant planning permission subject to conditions.

[63] Sections 18(1) and 18(2) of the Repealed City of Kuala Lumpur (Planning) Act, 1973 (Act 107) enact as follows:

Development order.

18(1) The Commissioner shall have power exercisable at his discretion to grant planning permission or to refuse to grant planning permission in respect of any development irrespective of whether or not such development is in conformity with the development plan; provided however the exercise of the discretion by the Commissioner under this subsection shall be subject to the provisions of subsection (4) of this section and s 19.

(2) Where the Commissioner decides to grant planning permission in respect of a development he may issue a development order —

(a) granting planning permission without any condition in respect of the development;

(b) granting planning permission subject to such condition or conditions as the Commissioner may think fit in respect of the development.

Provided that the Commissioner shall not issue a development order under this subsection unless he is satisfied that the provision of s 29 (1) relating to the assessment of development charges has been complied with.

[64] Finally, s 21(3) of the Federal Territory (Planning) Act 1982 (Act 267) enacts as follows:

Application for planning permission

21(3) Where the development involves the erection of a building, the Commissioner may give written directions to the applicant in respect of any of the following matters, that is to say —

(a) the level of the site of the building;

(b) the line of frontage with neighbouring buildings;

(c) the elevations of the buildings;

(d) the class, design, and appearance of the building;

(e) the setting back of the building to a building line;

(f) access to the land on which the building is to be erected; and

A (g) any other matter that the Commissioner considers necessary for purposes of planning.

[65] All these provisions are certainly thought provoking. They show the B relevance of the Development Orders. Here, the plaintiff applicant has failed to produce the Development Order for the subject property wherein the scheduled land is located from the relevant issuing authority. It can be inferred that the erection of the building on the subject property was built without the authority of the planning department from the relevant C authority. No wonder, it is not surprising that no such file was kept by the DBKL and no endorsement of any planning condition was ever made to the title of the subject property.

[66] It can also be inferred that since the plaintiff applicant had erected the D existing three storey building on the set back of 20 feet in the same manner as the other Lots especially Lot 31, it shows on the balance of probabilities that the plaintiff applicant had developed his land on his own volition after the establishment of DBKL bearing in mind that Lot 31 which is situated within the same vicinity with the subject property was granted a development E order on 15 July 1980. Thus, by his own conduct the plaintiff applicant had subjected himself to the conditions attached to Lot 31 and that would be to have a set back and surrender the scheduled land for road reserve. It is for these reasons that the plaintiff applicant has no exclusive control over the scheduled land and, at the time of the acquisition, the scheduled land is used F for public parking where members of the public have free access to it — either to park their motor vehicles or to walk on it, all day long. In short, at the time of acquisition by the State Authority, the scheduled land was not generating any income to the plaintiff applicant. It is ideal to refer, once again, to the case of *Land Administrator, District of Gombak v Huat Heng (Lim* G *Low & Sons) Sdn Bhd* where Hashim Yeop A Sani CJ (Malaya) (as he then was) at p 465 of the report referred to the principle governing compensation where there is a need to award compensation to the claimant by putting the claimant to his original financial position like as though there had been no acquisition of the claimant's land by the State Authority at all and applying H this simple proposition, it can be surmised that the plaintiff applicant did not lose financially when the scheduled land was acquired by the State Authority. There was therefore no necessity to inflate the compensation awarded to him by the land administrator. The nominal award of RM10 as awarded by the land administrator is adequate. This is also the decision of both the assessors.

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[67] By virtue of s 40D(3) of the LAA any decision made under this section is final and there shall be no further appeal to a higher Court on the matter. For the reasons as adumbrated above and after taking into account the opinion of each of the assessor on the various arguments advanced by the

parties, I reiterate that I affirm the nominal award of RM10 by the land administrator. Costs shall be borne by the plaintiff applicant. The finality of this judgment can never be doubted. Since the objection and the decision of this court are confined to the award of compensation handed down by the land administrator, the door to appeal to the Court of Appeal is closed forever by virtue of s 49(1) of the LAA.

[68] I am grateful to Madam Mastura Ma'sud, the learned counsel for the plaintiff applicant, for conducting the case in an inspiring manner. She has meticulously advanced all her arguments with care and candour. Initially, senior federal counsel Dato' Mohd Zaki bin Md Yasin (now Judge) conducted the case for the defendant respondent and later it was taken over by Dato' Mat Zaraai bin Alias. Now, it is Dato' Haji Ab Karim bin Haji Ab Rahman who has conduct of the matter. Needless to say that they performed extremely well.

Ordered accordingly

Reported by Navit Kaur Randhawa